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418563—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 555

C. R. KIRK & COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 11–13) is reported in 37 F. Supp. 934.

JURISDICTION

The judgment of the court below was entered on April 7, 1941 (R. 13). On May 15, 1941, the petitioner filed a motion for a new trial which was overruled on June 2, 1941 (R. 13). The petition for writ of certiorari was filed August 26, 1941 (R. 21). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the devices manufactured by petitioner and commonly known as "Blow Ball" machines are subject to the tax imposed by Section 609 of the Revenue Act of 1932 upon "games or parts of games."

2. If such devices are taxable, has petitioner established that it did not pass the tax on to its vendees?

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the applicable statute and regulations are set forth in the Appendix (*infra*, pp. 8–11).

STATEMENT

The special findings of fact of the Court of Claims (R. 7–11) may be stated as follows:

Petitioner, a corporation, manufactured and sold during the taxable period here involved "Jig-Saw Blow Ball" machines. A machine consists of a cabinet about 74 inches high, 24 inches wide, and 15½ inches deep, the front of which is enclosed by glass. At the rear is a panel on which is printed a map of the United States and upon this panel are 11 holes surrounded by pins and nails. Behind the panel is a motor which produces a current of air which blows a ball similar to a ping-pong ball up against the panel (R. 7–8).

The object of the game is to direct the ball into nine of the holes which are "live" holes. The player gets a certain score for each hole pene-

trated. A player scores poorly or well, depending upon his skill and luck. There is no inducement to play other than to test one's skill and luck or to match one's skill and luck against a competitor (R. 8).

Although the machine could be operated by only one player at a time, it was often used by players alternately in competition against one another to see who could make the highest score. Petitioner offered no prizes, awards, or inducements to encourage the use of the machine and no pay-out device was provided on the machines. In advertising the machines, petitioner represented, among other things, that "Jig-Saw is the Fastest Game You've Ever Seen" (R. 8).

Petitioner sold the machines outright, retaining no interest therein. The price at which the machines were sold was fixed by taking into consideration the cost of manufacture, overhead and selling costs, and a reasonable profit, together with consideration of what the machines could be sold for in competition with other machines (R. 9).

In most instances the machines were billed to petitioner's customers on an invoice which contained the statement "federal tax paid." Beginning with the first sale of the machine and continuing throughout the period involved in this suit, petitioner maintained on its books a "Reserve for Excise Tax" account. When a machine was sold, the total price was charged to accounts

receivable and one-eleventh of that amount was credited to the Reserve for Excise Tax and ten-elevenths to sales account. In preparing its excise tax returns, petitioner set up as tax due one-eleventh of the total net sales for the period covered by the returns (R. 9). Petitioner did not make a manufacturer's excise tax return for the month of February 1938 until demand was made by the deputy collector. Pursuant to this demand a return was filed and the tax shown due paid. Later petitioner filed returns for the months of March, April, and May 1938 and paid the taxes shown thereon to be due. Upon determination by the collector that there was also tax due for June 1938, petitioner paid the amount so determined to be due. Claims for refund for the taxes so paid for the months of March through June were rejected by the Commissioner of Internal Revenue and this suit followed (R. 10–11). Upon the foregoing findings of fact the Court of Claims held that the devices in question were taxable and dismissed the petition (R. 12–13).

ARGUMENT

1. The court below was correct in holding that the Blow Ball machines manufactured by petitioner are subject to tax as "games or parts of games" within the meaning of Section 609 of the Revenue Act of 1932. Although the machines in question could be operated by only one person at a time, they were generally used or played by sev-

eral persons alternately in an endeavor to determine who could get the highest score. They were designed for amusement and recreation. Petitioner itself described the machine as "a game."

The decision of the court below is not in conflict with *White* v. *Aronson,* 302 U. S. 16, in which it was held that picture puzzles were not games or parts of games within the meaning of Section 609 of the Revenue Act of 1932. In that case, this Court referred to a decision of the Court of Claims in *Mills Novelty Co.* v. *United States,* 50 F. (2d) 476, certiorari denied, 285 U. S. 547, with respect to slot-operated gambling machines as not being helpful since (p. 21) "the coin-operated gambling machine has no resemblance to a jigsaw picture puzzle." Similarly here, the machines in question have no resemblance to jigsaw puzzles and the *Aronson* decision is not determinative. The court below, moreover, followed the decision of this Court in the *Aronson* case since it adopted the definition of "games or parts of games" as set forth in this Court's opinion.

Petitioner's contention (Br. 24–26) that the machines must not only be games or parts of games but must also be "articles commonly and commercially known as sporting goods" to be taxable is without merit. The clause "and all similar articles commonly or commercially known as sporting goods" is preceded by a semicolon and clearly does not place any limitation on the articles previ-

ously listed which include "games or parts of games." This was the view of the court in *Mills Novelty Co.* v. *United States, supra,* involving similar provisions under a prior act. The three circuit court of appeals decisions[1] referred to by the petitioner do not support its contention. The *Brunswick-Balke-Collender Co.* case involved an entirely different article. In the *Chicago Flag & Decorating Co.* case the District Court had held the articles (golf flags) not taxable and made a specific finding that the taxpayer did not sell them to sporting goods stores and that they were not commonly or commercially known as sporting goods,[2] but its decision was reversed by the Circuit Court of Appeals upon the main ground that the flags were "games or parts of games." The Circuit Court of Appeals also referred with approval to the *Edward J. Darby & Son, Inc.,* case, in which no mention is made of any requirement that articles to be taxable must be "commonly or commercially known as sporting goods." See *Feitler* v. *Harrison* (N. D. Ill.), decided May 14, 1941, not officially reported but found in 1941 Prentice Hall, Vol. 4, par. 62,711, holding punch boards taxable under this section.

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[1] *Brunswick-Balke-Collender Co.* v. *Harrison*, 116 F. (2d) 786 (C. C. A. 7); *Chicago Flag & Decorating Co.* v. *United States*, 119 F. (2d) 413 (C. C. A. 7); *Edward J. Darby & Son, Inc.*, v. *Rothensies*, 116 F. (2d) 268 (C. C. A. 3), certiorari denied, April 7, 1941, No. 807, 1940 Term.

[2] Decided April 19, 1940, not officially reported, but found in 1940 Prentice Hall, Vol. 4, par. 62,642.

2. Since taxability does not depend upon whether petitioner's products were commonly or commercially known as sporting goods, the failure of the Court of Claims to make a finding on the point is of no consequence.

3. Finally, petitioner is not entitled to a refund since it passed on the tax to its vendees; and the finding of the court (R. 9) that petitioner did pass on the tax in this case is fully supported by the invoices which stated that the federal tax was paid and that the tax was one-eleventh of the invoice price. *Cf. United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

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